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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1146

CIA DE NAV. MAR. NETUMAR,

Petitioner,

against

JOAQUIM CONCEICAO, NEW JERSEY EXPORT MARINE CARPENTERS, INC., and INTERNATIONAL TERMINAL OPERATING CO., INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

VICTOR S. CICHANOWICZ
Counsel for Petitioner
80 Broad Street
New York, New York 10004

TABLE OF CONTENTS

	PAGE
Citations of Opinions Below	1
Jurisdiction	1
Questions Presented	1
Statement	2
Reasons for Granting the Writ	5
Conclusion	11

APPENDIX A:

Opinion of the District Court on Motion to Set Aside Verdict	A1
Opinion of the Court of Appeals	A5
Judgment of the Court of Appeals	A19

CASES CITED

Crumady v. J. H. Fisser, 358 U.S. 423	6
H & H Ship Service Co. v. Weyerhaeuser Line, 382 F. 2d 711 (9th Cir. 1967)	9
Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315	10
Mahnich v. Southern S.S. Co., 321 U.S. 96	6, 7
Mitchell v. Trawler Racer, Inc., 362 U.S. 539	5, 6, 7
Nosal v. Calmar Steamship Corporation, 339 F. Supp. 1235 aff'd without opinion, 475 F. 2d 1395 (3d Cir. 1973)	9, 10
Ryan v. Pan Atlantic Corp., 350 U.S. 124	10, 11
Usner v. Luckenbach Overseas Corporation, 400 U.S. 494	5, 6
Waldron v. Moore McCormack Lines, 386 U.S. 724	6
Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563	8, 10

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, CIA DE NAV. MAR. NETUMAR, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on December 11, 1974.

Citations of Opinions Below

The opinion of the Court of Appeals for the Second Circuit is not yet officially reported. It is printed in Appendix A hereto, *infra*, p. A5. The memorandum decision of the District Court also is not reported. It is printed in Appendix A hereto, *infra*, p. A1.

Jurisdiction

The judgment of the Court of Appeals was entered on December 11, 1974, and a petition for a rehearing with a suggestion for a hearing *en banc* was denied on February 3, 1975. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

Questions Presented

1. Whether operative negligence on the part of the vessel's crew or those for whom the shipowner is responsible relieves the shipowner of its absolute duty to furnish a seaworthy vessel?

2. Whether an Appellate Court in order to sustain a jury's findings has either the jurisdiction or authority to make findings and reach conclusions outside of and contrary to the record?

3. Whether a finding of seaworthiness is inconsistent with and precludes a finding of negligence with respect to the same condition?

4. Whether a shipowner who appoints a competent stevedore is precluded from indemnity if he does not supervise the operation so as to prevent the stevedore from breaching its warranty of workmanlike service?

Statement

The plaintiff, a longshoreman, sustained an injury to his left foot on November 5, 1970, when it became caught between some pipe which he and other longshoremen in the employ of International Terminal Operating Co., Inc., (I.T.O.) were loading and stowing in a pipe bed which had been constructed on the weather deck of the SS MOSQUEIRO by marine carpenters in the employ of New Jersey Export Marine Carpenters, Inc. (New Jersey Export).

The SS MOSQUEIRO, which at the time was berthed at Pier 36, East River, New York City, was owned by Cia De Nav. Mar. Netumar (Netumar).

The plaintiff sued both New Jersey Export and Netumar. He alleged that New Jersey Export was negligent and had breached its warranty to construct a pipe bed which would not fail in normal use. Netumar was also alleged to have been negligent and the SS MOSQUEIRO unseaworthy because the pipe bed was not fit for its intended use.

The jurisdiction of the District Court was invoked because of diversity of citizenship, the matter in controversy exceeding, exclusive of interests and costs, the sum of ten thousand dollars, and trial by jury was demanded.

Both New Jersey Export and Netumar impleaded I.T.O. alleging that I.T.O. breached its warranty to perform the loading operation in a safe and workmanlike manner.

The plaintiff, his hatch boss Ratliff, Brooks and Head, fellow-longshoreman, who were also working on the loading of the pipe into the pipe bed in question, were in complete agreement that until approximately 10:00 A.M. when the plaintiff's accident occurred, drafts consisting of two pipes were picked up by the ship's loading gear from a lighter which was berthed outboard of the SS MOSQUEIRO, raised aboard the vessel, and lowered and landed gently onto the pipe already stowed in the pipe bed. They were also in complete agreement that the loading operation proceeded without any difficulty, that one or more uprights broke, and that when the accident happened the pipe in the bed was below the height of the uprights.

According to the plaintiff, when his accident occurred he was standing with his left foot resting on a pipe, which had been previously loaded into the bed, and was reaching across the pipe in order to disengage a hook from the forward end of one of the two pipes which had just been landed. It was his contention that some of the pipe at the forward end of the pipe bed shifted pinning his left foot under or between the pipe.

On redirect examination, Montella, New Jersey Export's General Manager and Foreman, the bed builder, who was not a witness to the accident, was permitted to testify over objection that when he reached the scene of the accident after the pipe had been moved in order to free plaintiff's left foot, he observed that the pipe was stowed much higher than the upright. Montella also testified that no matter what size pipe, diameter pipe or length pipe goes into that bed, the way I make a bed it will hold anything, and that after inspecting the split upright following the plaintiff's accident, and noting that it had round markings on it he could tell that the cause of the split was damage by the longshoremen in permitting the pipe to come into contact with it in the course of the loading operation.

On recross-examination Ratliff was emphatic that the only reason why it was not good practice to load the pipe above the height of the upright was because the pipe would roll out of the bed.

Captain William Wheeler, an expert witness called on behalf of I.T.O., testified that it is good practice to load the pipe over the uprights.

No claim of overloading was ever urged. In its charge to the jury the Court specifically restricted the negligence claim respecting stowage and the loading operations to supervision of the cargo operations and the manner used to load, stow and carry the cargo. Thus, not only was the alleged overloading not an issue submitted to the jury, but under the Court's charge, a finding of overloading was not only not permissible, but was contrary to the Court's charge.

There was no testimony that any of the ship's officers, or anyone for whom the shipowner would be responsible, directed, interfered with, or in any way was involved in the loading operation.

After trial before the Hon. Robert J. Ward and a jury on October 29, 30, November 1, 2 and 5, the case was submitted to the jury on written questions. New Jersey Export was found free of negligence and not to have breached its warranty to construct a proper and adequate pipe bed. Netumar was held to have been negligent but the SS MOSQUEIRO was found to be seaworthy. The plaintiff was found free of contributory negligence but I.T.O. was found to have breached its warranty of workmanlike service. Netumar however was denied indemnity because the jury found that its conduct precluded indemnity. Damages in the sum of $42,000.00 were awarded the plaintiff and judgment in accordance with the jury's answers to the questions was entered against Netumar.

Within ten days from the date the jury returned its verdict, Netumar moved for judgment notwithstanding the verdict or for a new trial. Judge Ward denied the motion.

Netumar then filed a notice of appeal and plaintiff filed a notice of protective cross appeal.

The appeal was argued on November 14, 1974 and decided and filed December 11, 1974. The United States Court of Appeals for the Second Circuit affirmed the judgment. The ground for affirmance was that the jury could have found that the accident was caused by overloading of the pipe crib, an issue that was not supported by the evidence, was not in issue, was never argued and was not submitted to the jury.

The defendnant Netumar then petitioned on December 26, 1974 for rehearing with a suggestion for a hearing en banc.

In the petition, Netumar, urged the Court to consult the tapes on which the argument was recorded to confirm that counsel for plaintiff unequivocally stated that overloading was not an issue submitted to the jury and that he had not argued overloading in his summation. Furthermore, a request was made for a copy of that portion of the transcript of argument (at Petitioner's expense) and that it be made part of the record in this case.

The petition further stated, in addition to the fact that overloading was not an issue submitted to the jury nor charged, that the law applied conflicted with decisions of the United States Supreme Court in holding that an isolated act of negligence on the part of the ship's crew no longer renders a vessel unseaworthy. Furthermore, some of the findings made by the Court were clearly unsupported by and contrary to the record.

The petition was not denied until February 3, 1975.

Reasons for Granting the Writ

1. The decision of the Court of Appeals for the Second Circuit misinterprets the decisions of this Court in *Usner* v. *Luckenbach Overseas Corporation,* 400 U.S. 494 and *Mitchell* v. *Trawler Racer, Inc.,* 362 U.S. 539, and is in

conflict with the landmark decision in *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96 and such other decisions as *Crumady* v. *J. H. Fisser*, 358 U.S. 423 and *Waldron* v. *Moore McCormack Lines*, 386 U.S. 724.

In *Usner* v. *Luckenbach Overseas Corporation, supra*, this Court held that the operational negligence of an employee of an independent contractor, occurring at the moment of injury to a co-worker, does not render a vessel unseaworthy. In its opinion this Court was careful to point out that its decision was not intended to change the doctrine of liability based on unseaworthiness as it has been developed over the last 25 years. It specifically noted that a vessel was unseaworthy if the method of loading her cargo or the manner of its stowage was improper.

The Court of Appeals, however, construed this decision and the decision in *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539 to mean that the misuse of seaworthy equipment by the ship's crew or those for whom the vessel is responsible, no longer renders the vessel unseaworthy but is nothing more than operative negligence. Their construction is contrary to the rulings of this Court which said in *Waldron* v. *Moore McCormack Lines*, 386 U.S. 724, at pages 726-727:

> "And in *Crumady* v. *The J. H. Fisser*, 358 U.S. 423, 3 L. ed. 2d 413, 79 S. Ct. 445, 15 NCCA3d 265, we further clarified the extent of unseaworthiness liability by holding that, even though the equipment furnished for the particular task is itself safe and sufficient, its misuse by the crew renders the vessel unseaworthy."

In *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96, this Court rejected the contention that negligence of the ship's crew relieved the shipowner of the duty to furnish a seaworthy appliance. It said at page 103:

> "Any negligence of the mate in selecting the rope and ordering its use as a part of the staging, or of

the boatswain in using it for that purpose, could not relieve respondent of the duty to furnish a seaworthy staging."

In *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 550, when this Court stated that there is a "complete divorcement of unseaworthiness liability from concepts of negligence" it was not holding that the act occurring at the time of injury was determinative on the question of liability as the Court below seems to construe it. In the *Mitchell* case this Court held that liability for an unseaworthy condition which arises during the course of a voyage is not dependent, as in negligence cases, on whether the condition existed for a time long enough for the shipowner to have learned about it and removed it, but was absolute. In stating that there was a complete divorcement of unseaworthiness liability from negligence concepts, this Court was holding only that the elements which were necessary to establish negligence had no part in establishing liability under the doctrine of seaworthiness.

2. The Court of Appeals went outside the record and found facts and reached conclusions that were unwarranted by the evidence.

The Court of Appeals concluded that confusion existed because of the "hurry and bustle of attempting to conclude the stowage in time for the vessel to sail." There was neither evidence nor claim that the sailing time of the vessel in any way was a factor in the loading operation. This therefore was not only a gratuitous but an erroneous conclusion by the Court.

The Court further stated unequivocally that there was *expert* testimony that it was bad practice to load pipe to a point well above the tops of the uprights of the crib. Again there was no evidence whatsoever to support this statement which should compel reversal. The only expert who expressed any view on this stated that such loading was good practice.

These are only some of the several statements of fact which the Court made that are not supported by the record, or contrary thereto.

The Court below therefore exceeded its jurisdiction both in determining matters not raised or passed on in the trial court, and also in making fact findings having no support of any kind in the record or being absolutely contrary thereto.

3. The decision below denies petitioner the right guaranteed by the Seventh Amendment to have all issues determined by a jury. As this Court held in *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U.S. 563, it is reversible error for a Court to resolve an issue which has not been submitted to and passed on by the jury.

On the argument of the appeal it was conceded by counsel for the injured longshoreman that overloading was not an issue on which the case was submitted to the jury.* The trial judge also did not charge the jury on any such issue and during the trial refused to permit any testimony on how much pipe the pipe bed could hold.

The decision of the Court below is not based on the record or issues raised below. It is axiomatic that an Appellate Court cannot take cognizance of matters not passed upon in the Court below and exceed its jurisdiction when it formulates its own fact findings without regard to the record and contrary thereto.

In its opinion the Court stated that: "There is no evidence from Piper or any other witness that he had given any information about the pipes, correct or incorrect, to the stevedores." However, it was undisputed that while

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* Oral argument was recorded on tape. Petitioner's request for a transcript of the argument made on the motion for rehearing was denied. It appears to be the rule of the Court of Appeals for the Second Circuit that transcripts of the oral argument are not available to counsel and that any written applications for such transcripts are not to be accepted from counsel. Apparently a transcript, however, would be furnished this Court if requested.

petitioner's Port Captain in conjunction with the ship's Master and Chief Officer drew up and approved the proposed stowage plan, it was subject to the approval of the stevedore. The stevedore, therefore, not only knew about the stowage of the pipes, but the plan itself of the stowage aboard the SS MOSQUEIRO had received the final approval of the stevedore. It was also undisputed that under the arrangement existing at the time, the stevedore was responsible not only for the manner of bringing the cargo aboard, but the manner of loading it, and that the ship's supervision was concerned only with shipboard stability and contamination of one cargo with the other.

4. The decision of the Court of Appeals for the Second Circuit is in conflict with decisions of other courts of appeals, particularly *H & H Ship Service Co.* v. *Weyerhaeuser Line*, 382 F. 2d 711 (9th Cir. 1967), and *Nosal* v. *Calmar Steamship Corporation*, 339 F. Supp. 1235, aff'd without opinion, 475 F. 2d 1395 (3d Cir. 1973).

In *H & H Ship Service Co.* v. *Weyerhaeuser, supra*, the Court held that a vessel owner was entitled to indemnification from substandard performing stevedore, unless the owner acted seriously to impair the stevedore. Furthermore, the Court indicated that where the vessel owner's conduct does not amount to preventing or seriously handicapping the stevedore, the vessel owner, as a matter of law, is not to be precluded from indemnification and that conduct which amounts to such handicap may not necessarily preclude indemnification.

The Court of Appeals in this action held that not only action, but inaction on the part of the shipowner could preclude indemnity. Inaction can never be sufficient to preclude indemnity in the opinion of the Ninth Circuit, *Weyerhaeuser*.

Another conflict exists in the ruling of this Court which held there was no inconsistency in holding that a ship could

be seaworthy and that the owner could negligently cause the accident.

In *Nosal* v. *Calmar Steamship Corporation, supra,* the Court held that just as it would be erroneous to hold that negligence must be established in order to prove unseaworthiness, so it would be erroneous to hold that negligence could exist in the absence of unseaworthiness. The Court in this action held that there was no inconsistency between the finding that the vessel was not unseaworthy and that the accident was caused by the shipowner's negligence. Clearly the finding was inconsistent.

As to indemnity from the stevedore, the decision of the Court of Appeals for the Second Circuit is in conflict with *Ryan* v. *Pan Atlantic Corp.,* 350 U.S. 124, *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co.,* 355 U.S. 563, and *Italia Societa* v. *Oregon Stevedoring Co.,* 376 U.S. 315.

The *Ryan* case, *supra,* held that a stevedoring contractor who enters into a service agreement with a shipowner is liable to indemnify the owner for damages sustained as a result of the stevedore's improper stowage of cargo.

Nacirema, supra, held if the stevedoring company renders a substandard performance which led to liability of the owner, the latter was entitled to indemnity absent conduct on its part sufficient to preclude indemnity. Furthermore, the right to indemnification is not defeated by the shipowner's own negligence. The *Italia Societa* decision, *supra,* held that the warranty of workmanlike performance is not lessened or avoided by the absence of negligence on the part of the warrantor.

In the action at bar, the Court has held that the failure of the shipowner's Port Captain to supervise the loading and his prior conduct and statements were sufficient to preclude indemnity. The holding is clearly erroneous and in conflict with the aforementioned decisions of the Supreme Court.

Initially, the shipowner had no duty to supervise the loading and stowage that it had turned over to the stevedore. Even assuming, *arguendo*, that it did, *Ryan, supra,* specifically held failure to inspect, correct and detect the unsafe condition does not prevent recovery.

Furthermore, the prior conduct and statements of the ship's Port Captain could in no way be construed as being either actively or passively negligent. The Captain did not direct, interfere with, nor was he in any way involved in the loading operation.

The jury found the ship seaworthy, and based on the charge, found by implication a safe place to work, that the pipe bed structure and fence were reasonably fit for the uses intended and that the method used for stowage of cargo was suited for safe operations. Therefore, it is not only illogical but absurd to hold that the shipowner was negligent in permitting the pipe bed to be overloaded though it was reasonably safe for its intended use and the place of work was safe, and that the shipowner by action or inaction hindered a safe method of stowage operations.

Conclusion

The questions raised are of sufficient importance to require review by this Court. Not only do they involve the proper interpretation and application of the law as it has been construed and defined by this Court, but also the authority and jurisdiction of the Court on review of a judgment entered on a jury verdict.

Respectfully submitted,

Victor S. Cichanowicz
Counsel for Petitioner
80 Broad Street
New York, N. Y. 10004

Opinion of District Court on Motion to Set Aside Verdict.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JOAQUIM CONCEICAO,

Plaintiff,

against

NEW JERSEY EXPORT MARINE CARPENTERS INC. and CIA DE NAV. MAR. NETUMAR,

Defendants and Third-Party Plaintiffs,

against

INTERNATIONAL TERMINAL OPERATING CO. INC.,

Third-Party Defendant.

Defendant and third-party plaintiff Cia de Nav. Mar. Netumar ("the shipowner") moves pursuant to Rules 50(b) and 59(a), Fed. R. Civ. P., for an order setting aside the verdict against it, and for judgment in its favor either dismissing the complaint or granting it indemnity, or in the alternative for a new trial. For the reasons which follow, the motion is denied.

Plaintiff, a longshoreman, testified that on November 5, 1970 while he was engaged in loading pipe into a pipe bed built by the co-defendant New Jersey Export Marine Carpenters, Inc. ("the carpenters") alongside the number 1 hatch on the shipowner's vessel, one or more of the

pipe bed uprights broke, as a result of which a length of pipe weighing approximately 1,800 pounds rolled onto his foot, causing injuries.

This action was brought by plaintiff against the carpenters and the shipowner who denied liability, cross-claimed against each other and impleaded the third-party defendant. The questions of whether either or both of the defendants was negligent, as well as the questions of whether the vessel was unseaworthy, whether the carpenters breached any warranty or workmanlike performance, whether plaintiff was negligent, whether the third-party defendant breached its warranty of workmanlike performance and whether any conduct of the shipowner prevented it from recovering indemnity from the third-party defendant were submitted to the jury.

In answers to twelve special interrogatories the jury found the shipowner negligent, and found in favor of the plaintiff, the carpenters and the third-party defendant, respectively.

The shipowner concedes that "on a motion under Rule 50(b) the evidence must be viewed in the light most favorable to the party other than the movant and the motion should be granted if (1) there is a complete absence of probative evidence to support a verdict for the non-movant or (2) the evidence is so strongly and overwhelmingly in favor of the movant that reasonable and fair-minded men in the exercise of impartial judgment could not arrive at a verdict against him." *Armstrong* v. *Commerce Tankers Corp.*, 423 F.2d 957, 959 (2d Cir.), *cert. denied*, 400 U.S. 833 (1970).

Although the Court might well have reached a different result had the case been tried to the Court alone, there is

sufficient probative evidence to support the verdict and reasonable and fair-minded men in the exercise of impartial judgment could arrive at the verdict reached by the jury.

William Montella, the carpenters' foreman, testified that Richard A. Piper, the port captain for the shipowner, told him exactly what to do in connection with the construction of the pipe bed including what nails and lumber to use. Moreover, he testified that he was not told how many pipes were to be stowed in the pipe bed beside the number 1 hatch or how much they weighed, nor was he shown the stowage plan. Significantly, the jury asked to see the stowage plan. Mr. Piper testified in a portion of his deposition which was read to the jury that the pipe bed was constructed pursuant to oral instructions which he gave to Mr. Montella and also that as port captain he was responsible for the loading of the vessel in conjunction with the ship's officers.

The foregoing evidence would be consistent with the finding of the jury that the vessel was seaworthy and that the carpenters performed their duties in a workmanlike manner. It is also consistent with the finding that the shipowner's conduct was sufficient to preclude indemnity because it exercised overall control over the construction of the pipe bed and the loading of the vessel.

The Court finds that the probative evidence is adequate to support the conclusion that the shipowner failed in its non-delegable obligation to furnish plaintiff a reasonably safe place to work. Despite the incidental delegation of certain functions to others, in this case the carpenters and the third-party defendant, the shipowner remained responsible for performing the overall operation with reasonable care. Its failure to perform the overall operation with reasonable care created an unsafe condition and

properly resulted in the jury's finding of liability. Accordingly, the shipowner's motion for judgment notwithstanding the verdict, or in the alternative for a new trial, is in all respects denied.

It is so ordered:

Dated: December 10, 1973.

ROBERT J. WARD,
U.S.D.J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 66—September Term, 1974.

(Argued November 14, 1974 Decided December 11, 1974.)

Docket No. 74-1344

JOAQUIM CONCEIÇAO,

Plaintiff-Appellee,

—against—

NEW JERSEY EXPORT MARINE CARPENTERS, INC.,

Defendant and Third-Party Plaintiff-Appellee,

and

CIA. DE NAV. MAR. NETUMAR,

Defendant and Third-Party Plaintiff-Appellant,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant-Appellee.

Before:

MEDINA, FRIENDLY and GURFEIN,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Robert J. Ward, *Judge.*

Cia. De Nav. Mar. Netumar, shipowner, appeals from a judgment granting damages for personal injuries to plaintiff and dismissing a cross-claim against New Jersey Export Marine Carpenters, Inc., and a third-party complaint against International Terminal Operating Co., Inc. There is also a protective cross-appeal by plaintiff.

Affirmed.

GEORGE J. DUFFY, Hoboken, New Jersey, (Baker, Garber, Duffy & Baker, Hoboken, New Jersey, on the brief), *for Plaintiffs-Appellee.*

WILLIAM F. LARKIN, New York, N.Y., (Larkin, Wrenn & Cumisky, of Counsel to Coppola & D'Onofrio, New York, N.Y., on the brief), *for Defendant and Third-Party Plaintiff-Appellee.*

VICTOR S. CICHANOWICZ, New York, N.Y., (Cichanowicz & Callan, New York, N.Y., on the brief), *for Defendant and Third-Party Plaintiff-Appellant.*

ALBERT V. TESTA, New York, N.Y., (Sidney A. Schwartz and Alexander, Ash, Schwartz & Cohen, New York, N.Y., on the brief), *for Third-Party Defendant-Appellee.*

MEDINA, *Circuit Judge:*

The SS Mosqueiro sailed from Pier 36, East River, New York City on her overseas voyage on November 5, 1970. That morning the task of loading and stowage was nearing completion and the parties to this appeal were

performing or failing to perform their respective functions in connection with the removal from a lighter, moored to the offshore or port side of the vessel, of a large quantity of huge steel pipes and stowing them on the forward weather deck of the vessel. In connection with this loading and stowing operation, one of the pipes was dislodged and rolled over the foot of the plaintiff, a longshoreman, causing the injuries on account of which the jury awarded him $42,000 damages.

There is no satisfactory proof in the record of the exact number of pipes actually lifted from the lighter and stowed on the forward deck of the vessel. But, as we shall see, the number of pipes was large. They were 30 to 40 feet long, about 18 inches in diameter and each weighed considerably more than a ton. Speaking in broad terms the functions of the parties to this appeal, in connection with the operation of removing the pipes from the lighter and stowing them on the forward weather deck of the vessel were: (1) it was the obvious duty of the shipowner, Cia. De Nav. Mar. Netumar, to decide where and how the pipes were to be stowed; (2) in connection with the stowage in a place where, during the voyage, heavy seas might be encountered, orders were given on behalf of the shipowner to New Jersey Export Marine Carpenters, Inc. (The Carpenters), to build cribs, crates or wooden pipe beds into which the pipes could be lowered and stowed by the winchman and the longshoremen, and two of these wooden pipe beds were built; (3) the actual loading and stowing were done by longshoremen such a Conceicao employed by the stevedore, International Terminal Operating Co., Inc. (ITO). These longshoremen in the employ of ITO included the winchmen, the hatch boss and, in this case, 8 longshoremen, including the plaintiff, who were stationed on top of the hatch covers at hatch No. 1 to guide the drafts into place in this pipe bed on the starboard or inshore side of the hatch.

Conceicao sued the shipowner, claiming that the unseaworthiness of the vessel and the negligence of the shipowner were proximate causes of the accident, and The Carpenters, claiming that a breach by The Carpenters of its implied warranty of workmanlike performance was a proximate cause of the accident. Each of these cross-claimed against the other, and they also asserted a claim against ITO as a third-party defendant.

The case was tried to Judge Ward and a jury. In answer to written interrogatories the jury found:

(1) That the vessel was not unseaworthy but that the shipowner was guilty of negligence that was a proximate cause of the accident, thus establishing plaintiff's claim against the shipowner, exonerating plaintiff of any contributory negligence and fixing the damages at $42,000.

(2) That The Carpenters had not breached any warranty of workmanlike performance that it owed plaintiff, thus finding no liability on the part of The Carpenters for improperly constructing the pipe bed.

(3) That ITO had breached its warranty of workmanlike performance of the stevedoring operation and that this breach was a proximate cause of the accident, but that the conduct of the shipowner had been such as to prevent the shipowner from recovering indemnity from ITO on the claim against ITO as third-party defendant. In terms of the instructions to the jury this meant that indemnity was denied because the jury found that the shipowner "by some action or inaction * * * prevented, hindered or seriously handicapped ITO in performing its workmanlike job."

The result of these findings was a judgment in favor of Conceicao and against Netumar for the amount of damages fixed by the jury. The claims and cross-claims against The

Carpenters and ITO were dismissed. The trial judge on December 10, 1973 filed an unreported opinion denying the shipowner's motion to set aside the verdict and for judgment in its favor either dismissing the complaint or granting it indemnity against ITO or in the alternative for a new trial. The shipowner appeals. There is also a protective appeal by Conceicao.

I

How the Accident Happened and the Issues on This Appeal

There was evidence from which the jury was justified in concluding that on the morning of November 5, 1970 there was a lighter on the port or offshore side of the Mosqueiro and on this lighter were the heavy pipes to be loaded and stowed on the vessel. Alongside the port and starboard No. 1 hatches, which were those nearest to the bow of the vessel, The Carpenters had constructed two wooden pipe beds or cribs. In loading the starboard or inshore crib the pipes were lifted, two at a time, from the lighter, swung across the No. 1 hatches and guided by the longshoremen, who were standing on the closed and battened down hatch covers of the starboard hatch No. 1, to a position just over the pipe crib. Then the two pipes were lowered gently into the crib. As soon as the pipes were in place, a longshoreman at both the bow and stern end of the pipe would step forward from his position on the hatch covers and release the hooks holding the pipes.

There was ample testimony concerning the proper manner of building a pipe crib and concerning the manner of building this particular crib. It was made of new lumber with a number of whalers at the bottom and sturdy uprights about five feet high at intervals of five feet. The whole affair was tightly wedged against the steel coaming

of the hatch on one side and similarly wedged against the rail of the vessel on the other.

The testimony of plaintiff and others was to the effect that the draft of two pipes was gently lowered to a place about the center of the stow of pipes, that he stepped forward to release the hook at his forward end of the pipes when one or more of the uprights broke apart, "the pipes moved" and his foot was crushed. This was the last draft loaded into the starboard crib. The very considerable number of remaining pipes was not placed in any crib but was stowed athwartship over the port and starboard No. 1 hatch covers. Before this draft pipes had been stowed to the top of the uprights and there is some testimony to the effect that pipes had been loaded to a point well above the tops of the uprights. There is expert testimony that this was bad practice. In any event, one or as many as three of the uprights broke apart and, as the pipes in the stow shifted, one of them caught Conceicao's foot. Only the forward end of the stow shifted, as the after end of the load of pipes rested against the deckhouse on which the winches and the winchmen were located.

We think it too clear for extended discussion that the jury had before it proof to justify a finding that the pipe crib was in every respect properly built by The Carpenters and that the findings that the vessel was seaworthy and that The Carpenters had not breached their implied warranty of workmanlike performance must stand. The pipe crib was fit for the purpose for which it was intended to be used. We also think the evidence justified a finding by the jury that a stevedore with expertise and special competence in the loading and stowage of vessels, including the filling of pipe cribs, should know enough not to overload a pipe bed and cause some of the uprights to break off and dislodge some of the pipes. Findings that ITO had breached its warranty of workmanlike perfor-

mance and that this breach was a proximate cause of plaintiff's accident are supported by sufficient evidence.

The substantial questions on the appeal concern the finding of negligence on the part of the shipowner and the additional finding that the shipowner had acted or failed to act in such a manner as to defeat the shipowner's claim for indemnity against ITO.

II

The Shipowner Was at Fault in Many Respects

The deposition of the shipowner's Port Captain, Richard A. Piper, was read at the trial. It was his job to lay out the stowage of all outbound cargo and to supervise the loading in conjunction with the Master and Chief Officer of the vessel. What the jury could have found was that, although Piper knew the exact quantity of pipes to be loaded and already had decided that three pipe beds were necessary, two at No. 1 hatch and another at No. 2 hatch, as is clearly shown on the Stowage Plan that was received in evidence as Plaintiff's Exhibit 4, he did not show the Stowage Plan to William Montella, the foreman of The Carpenters, nor did he tell Montella the quantity of pipes to be loaded. While Piper insisted that he did tell Montella how many pipes were to be loaded and that he ordered three pipe beds, including the one at No. 2 hatch that was to stow 72 pieces of pipe according to the Stowage Plan, these statements were denied by Montella and it was a function of the jury to decide which witness to believe.

It appears from Piper's deposition that he was not present at the time of the loading and stowage and that he did nothing to supervise the operation. Later, he did appear at the scene of the accident. Assuming, as we

must, that Piper had failed to give the necessary information to The Carpenters, we think it was proper for the jury to conclude that it was negligence not to give this information to those who needed it and that it was also negligence not to do something by way of supervision to cure this omission. There is no evidence from Piper or any other witness that he had given any information about the pipes, correct or incorrect, to the stevedore. That the jury could have found that the accident was caused by the overloading of the pipe crib is perfectly plain to us. The testimony that, even if additional pipes are loaded at the top of the pile and in the middle, there are lateral forces at work in the pipe crib, is not disputed. Moreover, this is a simple matter of physics, and the height of the pile of pipes and the breaking of one or more of the uprights support the inference of overloading. The jury did not have to believe Montella's opinion that one of the drafts had been carelessly handled and hit one of the uprights and split it.

That something went wrong cannot be doubted. The third pipe bed at hatch No. 2 was not built. Before the accident Piper did not even look at the pipe beds that were built and he did not know that the third pipe bed had not been built. A large quantity of pipes were stowed athwartship on top of the hatch covers at hatch No. 1. The loading of pipes in the starboard pipe bed was up to the top of the uprights or higher. And the necessary information for the proper conduct of the loading and stowage operation had not been given to those to whom the information was indispensable if they were to do a proper job. When these pieces of proof are put together, we think there was ample to justify a finding that the shipowner had failed to give this particular part of the loading and stowage operation the necessary supervision,

and that this failure of supervision was a proximate cause of the accident. This same combination of items of proof in the testimony of the various witnesses we think justifies the finding that the shipowner was not entitled to indemnity from ITO because the shipowner had "by some action or inaction • • • prevented, hindered or seriously handicapped ITO in performing its workmanlike job."

For some reason, which is not clear to us, the shipowner seems to think that "inaction" by the shipowner could not possibly constitute negligence. We are unaware of any general distinction between "action" and "inaction" in the field of liability for negligence. Everything depends upon the facts and circumstances of the particular case. Here there was evidence from which the jury might find that, because of the misinformation given by Piper to Montella concerning the requisite number and location of the pipe beds to be built and his failure to advise concerning the large number of pipes and the places where they were to be stowed, as appeared in the Stowage Plan, there resulted the confusion and excess of pipes that the jury could have found were a proximate cause of the overloading. In the hurry and bustle of attempting to conclude the stowage in time for the vessel to sail on November 5th the jury might have found that the shipowner was negligent in ordering too much pipe to be loaded at hatch No. 1 or that the shipowner had ordered too much pipe to be stowed on the weather deck of the vessel in the first place. The jury may well have thought that, had Piper been at the scene at the time the stowage of the pipes commenced, he would have at once known that the directions he thought he had given had been disregarded and that in the endeavor to stow at hatch No. 1 more pipes than the crib would hold there was a probability of overloading the crib.

III

The Law

A

One of the most interesting developments of judge-made law in modern times commenced with the decision by the Supreme Court in *Seas Shipping Co., Inc.* v. *Sieracki*, 328 U.S. 85 (1946), which treated longshoremen and other shore workers as seamen because the work by these longshoremen and shore workers was said to be the same as was anciently performed by seamen. This made it possible for these longshoremen and shore workers to by-pass the limited recoveries provided by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., Sections 901ff, and to obtain very much larger recoveries by way of damages fixed by the juries who decided the cases under the Jones Act. In the course of time we faced an infinite variety of cases where there was interplay between the shipowner's warranty of seaworthiness of the vessel and its appurtenant appliances and equipment, the newly expanded implied contract of workmanlike performance and the long standing doctrine of negligence. It was not very long before the various court decisions had construed the warranty of seaworthiness and the doctrine of negligence in so many different ways as to make it difficult or perhaps impossible for conscientious judges to know how to instruct juries or make decisions in specific cases. That the two rules, unseaworthiness and negligence, were wholly distinct and separate was finally clarified by the landmark opinion of Mr. Justice Stewart in *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539 (1960).

In the course of time this Court decided *Grillea* v. *United States*, 232 F.2d 919 (1956), and there ensued a number of decisions both in the Second Circuit and in other circuits

that interpreted in various ways situations where a negligent act by the stevedore was held to be or not to be the creation of a condition that made the vessel unseaworthy. On the one hand, it was thought that if the single act was more than simply part of the "continuous courts of operation" of the stevedore, unseaworthiness of the vessel might be found, whereas if the defect was solely an isolated instance that arose in the course of the work, it was negligence on the part of the stevedore and not unseaworthiness of the vessel. On the other hand, some cases held that unseaworthiness could not result from operative negligence. Some of the decisions of this Court, and particularly the dissent of our brother Friendly in *Sribrinski* v. *Waterman Steamship Corporation*, 360 F.2d 539 (1966), indicated the unsatisfactory state of affairs and the conflicts of authority in the various circuits. Fortunately for us, this difference of opinion was set at rest by the Supreme Court in 1971 in *Usner* v. *Luckenbach Overseas Corporation, et al.*, 400 U.S. 494. Again, the clarifying opinion of the court was written by Mr. Justice Stewart. In that case the longshoremen were stowing cargo from a barge positioned alongside the vessel. The winchman operating the winch and boom at a hatch had lowered the draft, but he did not lower it far enough. One of the longshoremen motioned to the flagman standing on the deck of the ship to direct the winch operator to lower the fall farther. But the winchman lowered the fall too far and too fast and the swing of cargo knocked one of the longshoremen to the deck of the barge and caused his injuries. This is precisely the same as if, in the present case, the winchman, instead of lowering the two drafts of pipes gently into the pipe crib, had dropped them down with a bang and thus dislodged some of the pipes. And this in turn is the equivalent of the single, separate act of overloading in the

case before us which caused the breaking of the uprights and a dislodgment of the pipe which rolled upon the plaintiff's foot. Here we see a perfect illustration of the difference between unseaworthiness and operative negligence.

We can find no such inconsistency between the finding that the vessel was not unseaworthy and the finding that the accident was caused by the shipowner's negligence, as is claimed by the shipowner on this appeal. The decision in *Usner* repeats the teaching of *Mitchell* that there is a "complete divorcement of unseaworthiness liability from concepts of negligence." The Court stated, 400 U.S. at page 500:

> What caused the petitioner's injuries in the present case, however, was not the condition of the ship, her appurtenances, her cargo, or her crew, but the isolated, personal negligent act of the petitioner's fellow longshoreman. To hold that this individual act of negligence rendered the ship unseaworthy would be to subvert the fundamental distinction between unseaworthiness and negligence that we have so painstakingly and repeatedly emphasized in our decisions.

In footnote 19 the Supreme Court expressly rejected the interpretation of *Mascuilli* v. *United States*, 387 U.S. 237 (1967) that negligence might create "instantaneous unseaworthiness," an interpretation which the Second Circuit had adopted in *Candiano* v. *Moore-McCormack Lines, Inc.*, 382 F.2d 961 (1967), *cert. denied*, 390 U.S. 1027 (1968).

Although the Supreme Court in *Usner* spoke to a situation in which neither the shipowner nor the crew were involved in the accident, the logic of the opinion applies with equal force to situations in which an isolated act of the shipowner proximately caused the accident. The jury might properly have concluded that the shipowner's in-

adequate instructions to The Carpenters created a further duty to supervise the actual loading of the pipes and that the breach of this latter duty as an excessive number of pipes were loaded into the crib was the isolated event which cast liability on the shipowner for negligence.

B

Although the stevedore was negligent, the jury properly found on sufficient evidence that the conduct of the shipowner precluded indemnity because the shipowner "by some action or inaction * * * prevented, hindered or seriously handicapped ITO in performing its workmanlike job."

It is not simply the complete failure of Piper or any other representative of the shipowner to supervise the loading and stowage at hatch No. 1, it is the prior conduct and statements of Piper, which were "active," which created the situation which made the supervision especially necessary. Probably the jury found that this was a combination of "action" and "inaction."

It is historically true that the recovery of indemnity originated in cases where the shipowner was held liable for a breach of the absolute warranty of seaworthiness where the condition of unseaworthiness had been caused by the conduct of the stevedore. *DeGioia* v. *United States Lines Company*, 304 F.2d 421 (2d Cir. 1962); *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Corporation*, 350 U.S. 124 (1956); *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co., Inc.*, 355 U.S. 563 (1958). And the right to indemnity has been extended to a case where there was a finding of negligence on the part of the shipowner. *Drago* v. *A/S Inger*, 305 F.2d 139 (2d Cir.) *cert. denied sub nom. Daniels & Kennedy, Inc.* v. *A/S Inger*, 371 U.S. 925 (1962).

It is clear that theories of "active or passive" or "primary or secondary" negligence are not appropriate in this type of case.

The shipowner was entitled to indemnity "absent conduct on its part sufficient to preclude recovery" and "the evidence on these issues * * * was for jury consideration under appropriate instructions." *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co., Inc.*, 355 U.S. 563, 567 (1958). The allowance or disallowance of indemnity in this type of case depends upon a balance or interplay of the doctrines of unseaworthiness, negligence and breach of the implied contract of workmanlike performance that Judge Clark, in the leading case of *DeGioia* v. *United States Lines Company*, 304 F.2d 421 (2d Cir. 1962), stated as follows, at p. 426:

> The function of the doctrine of unseaworthiness and the corollary doctrine of indemnification is allocation of the losses caused by shipboard injuries to the enterprise, and within the several segments of the enterprise, to the institution or institutions most able to minimize the particular risk involved.

This test was approved and applied by the Supreme Court in *Italia Societa* v. *Oregon Stevedoring Co., Inc.*, 376 U.S. 315, 324-5 (1964).

We think it clear that the party to this case most able to minimize the particular risk involved was the shipowner since, on sufficient evidence, the jury found that there was "action or inaction on the part of the shipowner which prevented, hindered, or seriously handicapped the stevedore in performing a workmanlike job."

Affirmed.[1]

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1 As Conceicao was injured on November 5, 1970, the new provisions of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1251, are not applicable. See *Cooper Stevedoring* v. *Fritz Kopke, Inc.*, decided May 28, 1974 (—— U.S. —— (1974)).

Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of December one thousand nine hundred and seventy-four.

Present: HON. HAROLD R. MEDINA,
HON. HENRY J. FRIENDLY,
HON. MURRAY I. GURFEIN,
Circuit Judges.

JOAQUIM CONCEICAO,
Plaintiff-Appellee,

v.

NEW JERSEY EXPORT MARINE CARPENTERS INC. and CIA DE NAV. MAR NETUMAR,
Defendants and Third-Party Plaintiffs,

CIA DE NAV. MAR NETUMAR,
Defendant and Third-Party Plaintiff-Appellant,

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Third-Party Defendant.

Appeal from the United States District Court for the Southern District of New York.

Judgment of the Court of Appeals.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the defendant and third-party plaintiff-appellant Cia De Nav. Mar Netumar.

A. DANIEL FUSARO,
Clerk

By VINCENT A. CARLIN,
Chief Deputy Clerk

A true copy.

A. DANIEL FUSARO,
Clerk

By VINCENT A. CARLIN,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74—1146

CIA DE NAV. MAR. NETUMAR,

Petitioner,

against

JOAQUIM CONCEICAO, NEW JERSEY EXPORT MARINE CARPENTERS, INC., and INTERNATIONAL TERMINAL OPERATING CO., INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LARKIN, WRENN AND CUMISKY
of Counsel to Coppola & D'Onofrio
Attorneys for Respondent
New Jersey Export Marine Carpenters, Inc.
11 Park Place
New York, New York 10007

TABLE OF CONTENTS

	PAGE
Statement	1
Issues	1
Facts	2
POINT I—Reason for denying petitioner certiorari as to respondent New Jersey Export	7
Conclusion	8

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Statement

The petitioner herein does not contest the holding of the Trial Court that the evidence supported the jury's finding that New Jersey Export Marine Carpenters, Inc., performed its duties in a workmanlike manner (A3 of Petition) or the affirmation of that holding made in the Second Circuit Court of Appeals (A10 of Petition).

Issues

Whether the petitioner is not entitled to any further review of the judgment in favor of New Jersey Export Marine Carpenters, Inc.

Whether the petition should be denied as to New Jersey Export Marine Carpenters, Inc., no matter what disposition is made of the issues otherwise presented by petitioner herein.

Facts

The subject accident occurred on November 5, 1970 aboard the S. S. Mosqueiro while berthed at Pier 36. As pertains to respondent New Jersey Export Marine Carpenters, Inc. (hereinafter called New Jersey Export), the following facts were developed on the trial of this action:

Richard Piper did not appear personally on trial but his pre-trial deposition was read into evidence. He testified that he was defendant shipowner's Port Captain on this vessel at the time of the occurrence of the accident in issue (A171-172).* He had the responsibility for its loading and unloading (A175), to coordinate storage, the ordering of labor and equipment therefor and the over-all supervision of the loading operation (A172). In conjunction with the ship's master and chief officer and with the approval of the stevedore, he proposed the stowage plan (A173).

Captain Piper testified on his examination before trial that since he had quite a bit of pipe to stow (A179), some days before this accident (A182) he verbally ordered from New Jersey Export, through its head foreman William Montella (A201-202), the construction of pipe cribs (A182). Captain Piper stated that he thought he ordered three cribs (A184). The order also included lashing the pipes to be performed by the carpenters after stowage was completed (A183). He said that the material listed on the New Jersey Export labor record was ordered only after consultation by the carpenter foreman with the Port Cap-

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* (Numbers preceded by letter A indicates page reference of the Appendix on appeal in the Circuit Court of Appeals.)

tain (A321). He admitted that he did not specifically tell Montella that there were 41 pieces of pipe but he said "he gave him full booking of the vessel and left it up to him as to the number of areas he would require to stow it safely" (A185). Since the Port Captain never appeared on trial to explain the term to the Court, the meaning of "full booking of the vessel" is not known. Captain Piper also never testified that he ever told New Jersey Export or its employees of the weight of the pipes to be cribbed. He stated that New Jersey Export would determine the size and location of each bed when he told Montella the number of pieces, the dimensions and length of the pipe (A182-183, A184, A185-186).

William Montella, who did testify on trial, stated that Captain Piper verbally ordered not three but two cribs (A169, A202, A253). In accordance with direction (A253) the New Jersey Export foreman built these cribs, one on the port and one on the starboard side of Hatch #1 (A202). He definitely asserted that Piper never told him the number of pipes he had or their weight (A167-168, A252) and that he, Montella, never saw or had access to the stowage plan (A233-234) or the Port Captain's documents (A234-235). Montella stated that the Port Captain would order what he wanted (A234). When one or more pipe beds or cribs were ordered he always built them the same way depending for their size only upon the limitation of the space designated within which to construct the items (A168, A253-254, A255). It was Captain Piper who alone laid out the ship and informed Montella what he wanted done (A170, A234). Montella was not an engineer (A243). ITO's hatch boss stated that it was the stevedore who told him what cargo to put there (A81). In fact, this ITO witness testified that the carpenters, although in the area to lash the pipe on completion of stowing, never said anything to him about loading (A98, A106-107). The ITO maritime expert testified that the ship customarily should detail what it wants from the carpenter and tell that con-

tractor the size and weight of the cargo to be stowed and the carpenter then only orders such men and material as is required to do the job (A375-376).

William Montella testified that in building these cribs New Jersey Export under his direction laid 4 x 6" lengths of lumber on the deck from hatch combing to ship's rail about five feet apart. On either side of those he nailed 4 x 6" uprights with 4 x 6" fillers. Along the base of the uprights for the length of the crib which ran fore and aft of the ship he nailed one 4 x 6" whaler and he nailed another 42 inches above that. The entire structure was tied together by horizontal 2 x 4" or 2 x 10" lumber so that the finished product was firm (A203-204). The witness' description of this structure was substantially confirmed by plaintiff's testimony (A63-67). This witness stated that he used all new lumber (A204) and he had finished this construction the day before the accident (A204, A235). All witnesses agreed that the crib in issue had been completed and was empty on the morning of the accident (A42, A98, A124-125, A145, A182). Mr. Montella testified that this crib like all the others he fashioned was five feet high (A253). This height of the crib walls was corroborated by the other witnesses (A101-102, A308) with the exception of one witness who testified that the crib walls were about ten feet h'gh (A125-128). With five foot walls, this would leave the top of the crib walls about two to three feet above the coaming of the hatch (A51-52, A102, A128).

Captain White, the New Jersey expert witness, testified that the subject crib as built was adequate for its intended purpose to hold a reasonable load (A261-262, A296). Captain Wheeler, the International Terminal Operating Co., Inc., expert (hereinafter called ITO), testified that he could not give an opinion one way or the other about the sufficiency of the structure because he felt that he did not have enough details of its structure (A335-336). The ITO expert stated, however, that the crib was correct in ap-

pearance and did prove satisfactory during the two or three hours of stowage before the accident (A337). The defendant ship presented no evidence to challenge the propriety of this crib construction. There was not one word said on trial from which a finding could be made other than that the lumber and material used in this crib was of top grade.

The ITO maritime expert testified that after the crib was erected, it was the duty of the ship's personnel to make a detailed inspection for sufficiency (A331, A370-371). Thereafter, he said, the hatch boss is supposed to make only a visual inspection of the crib and load in it whatever he is told to by the ship foreman or the pier superintendent (A336-337, A338). He testified that the ship had an officer in over-all supervision of loading (A384-385). New Jersey Export maritime expert also testified that when the carpenters finish such a crib it is proper procedure that the vessel's officer inspects the product visually and by shaking it to see that it is solidly built (A267-269) and that the stevedore boss then makes a visual and physical inspection (A297-298). He said that the crib installations were subject to ship officers' approval (A267).

The loading operation, during which plaintiff's accident occurred, started the morning after (A26-27) the crib was completed (A42, A98, A124-125, A145, A182, A204, A235).

All motions made at the close of plaintiff's, the ship's and the entire case were denied by the Court (A190-200 A323-332, A391-393). It is interesting to note that the Court, in denying the ship's motion at the end of plaintiff's case, reminded the ship's attorney that there was no evidence to show that New Jersey Export was ever informed of the weight of the subject pipe and that the tetimony given by the ship's Port Captain indicated that he had not even told the carpenters of the number of pipes these cribs were to accommodate (A196-197). No further testimony or other proof was presented by the ship or the

plaintiff to supply this weakness in the proof after this shortcoming in their cases was pointed out to them.

In deciding the motions made by New Jersey Export against it at the end of plaintiff's case, the Court ruled that the law of the case would be that New Jersey Export owed the plaintiff the warranty of workmanlike performance and of strict liability since there was an issue that the carpentry contractor could have foreseen that longshoremen would be using the crib constructed by New Jersey Export in the manner in which they did (A192-193). Exception was taken to this ruling (A193).

The Court charged the law on the elements of plaintiff's action against the ship and New Jersey Export (A404-420). On the matter of the warranty owed by New Jersey Export to the plaintiff, the Court instructed that this defendant owed the plaintiff the duty to perform its assigned task in a workmanlike manner and to build a reasonably fit and safe pipe bed. Although the Court charged that the plaintiff had the burden of proof in this respect, the jury was also instructed that it was no defense to this cause of action that the plaintiff did not discover or correct the subject crib. The Court said that the plaintiff's claim could be defeated on this issue only if he seriously hampered or hindered New Jersey Export from doing its work properly (A421-422). The Jury was also given the question of whether the ship's conduct prevented New Jersey Export from doing its work in a workmanlike manner (A439).

The only exception to the charge as it referred to New Jersey Export was made by the plaintiff and the ship to the effect that the instructions of the Court on the issue of New Jersey Export warranty duty to the plaintiff was not strong enough (A448, A450).

The Jury returned findings that New Jersey Export was not negligent in causing plaintiff's accident and that New

Jersey Export did not breach its warranty of workmanlike performance owed to the plaintiff. Accordingly, a verdict was rendered in favor of New Jersey Export (A463-464).

POINT I

Reason for denying petitioner certiorari as to respondent New Jersey Export.

The accident of Joaquim Conceicao occurred during a loading operation by the stevedore of pipes into a crib. The crib had been completed by the respondent New Jersey Export before the loading commenced. The jury was amply justified in finding that the subject crib had been soundly built according to specifications given the carpenter. The carpenter cannot be held liable for the conduct which occurred or the conditions coming into existence during the use of the crib after its proper construction had been completed by respondent New Jersey Export and it had been delivered to the ship (*Swain* v. *Boeing Airplane Company*, 337 F. 2d 940, cert. den. 380 U.S. 915).

The jury verdict as to the respondent New Jersey Export is unassailable on appeal since it is firmly based on the evidence (*Lavender* v. *Kora*, 327 U.S. 645, 653; *Atlantic and Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 358, 359).

No matter what other disposition is made of this petition, it should be denied as to respondent New Jersey Export. The carpenter's involvement in this action has nothing whatsoever to do with the facts or the law upon which petitioner relies for its request for further review.

CONCLUSION

There are no grounds for further review of the judgment in favor of New Jersey Export Marine Carpenters, Inc.

Respectfully submitted,

LARKIN, WRENN AND CUMISKY
of Counsel to Coppola & D'Onofrio
Attorneys for Respondent
New Jersey Export Marine Carpenters, Inc.
11 Park Place
New York, New York 10007

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NATHAN BAKER,
Counsel for Respondent Joaquim Conceicao,
1 Newark Street,
Hoboken, New Jersey, 07030.

GEORGE J. DUFFY,
BAKER, GARBER, DUFFY & BAKER,
A Professional Corporation,
Of Counsel.

Allied Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-6611-12

TABLE OF CONTENTS

	PAGE
RESPONDENT, JOAQUIM CONCEICAO, PRAYS THAT PETITION BY CIA DE NAV. NETUMAR BE DENIED	1
CITATIONS OF OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT SOUGHT BY PETITIONER	3
CONDITIONAL CROSS-PETITION	5
CONCLUSION	6

Cases Cited

Atlantic and Gulf Stevedores Inc. v. Ellerman Lines, 369 U. S. 355, 82 S. Ct. 780, 7 L. Ed. 2d 798 (1962), rehearing denied, 369 U. S. 882, 82 S. Ct. 1137, 8 L. Ed. 2d 284 (1962)	3, 5
Cooper v. D/S A/S Progress, 188 F. Supp. 578 (D. C. Pa., 1960)	4
Gallick v. Baltimore and Ohio R.R., 372 U. S. 108 (1963)	5
Henry & Braye v. A/S Ocean and John P. Pederson & Sons (decided Jan. 6, 1975 docket nos. 73-2153, 73-2868, 2d Cir.; —— F. 2d ——)	5
Malm v. United States Lines, 269 F. Supp. 731 (S. D. N. Y.) affd. on the district court's opinion 378 F. 2d 911 (2 Cir. 1967)	5

PAGE

Mitchell v. Trawler Racer Inc., 362 U. S. 539 4

Usner v. Luckenbach Overseas Corporation, 400 U. S. 494 4

Statutes Cited

28 U.S.C.:

Sec. 1254(1) 2

33 U.S.C. (Longshoremen and Harbor Workers' Compensation Act):

P.L. 92-576, 86 Stat. 1263 5

Sec. 905(b) 5

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent, Joaquim Conceicao, Prays That Petition by Cia De Nav. Netumar Be Denied

Citations of Opinions Below

The affirming opinion of the Court of Appeals for the Second Circuit is reported at 508 F.2d 437 (1974). The

memorandum opinion of the trial court that the evidence presented supported the jury's verdict is not officially reported (See Appendix to Petition A1-A4).

Jurisdiction

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C., §1254(1).

Question Presented

Where the trial court and circuit court of appeals have found and sustained that the jury concluded with reason the petitioner shipowner was negligent, should this court entertain further review?

Statement of the Case

This is a longshoreman personal injury case for damages. The petitioner shipowner was sued for negligence and unseaworthiness; respondent, New Jersey Export Marine Carpenters Inc., was also sued as defendant for negligence and breach of warranty of workmanlike performance owed to plaintiff, an International Terminal Operating Co. Inc. longshoreman. Both defendants crossclaimed against each other and both impleaded the employer, International Terminal Operating Co. Inc., as a third-party defendant alleging breach of warranty of workmanlike performance. After a five day trial, a jury verdict was returned in favor of plaintiff and against petitioner, Netumar, for $42,000.00 on the grounds of negligence. In response to specific interrogatories, the jury found the vessel to be seaworthy; New Jersey Export

was neither negligent nor in breach of any warranty owed plaintiff; and that while International Terminal Operating Co. Inc. was guilty of breach of its warranty of workmanlike performance, the conduct of petitioner, Netumar, was such that it was precluded from recovering on its indemnity claim.

Post-trial motions by the petitioner, Netumar, were in all respects denied (A1-A4 Appendix to Petition).

The verdict of the jury and the decisions below affirming that verdict turn upon the facts presented in this case. The facts were reviewed at length in the opinion of Judge Medina reported at 508 F.2d 437 (A5-A18).

Reasons for Denying the Writ Sought by Petitioner

Petitioner has not demonstrated any conflict in decisions on any issue of substantive law to merit review by this court.

While the injuries sustained by the respondent, Conceicao, were serious, and the litigation is a matter of substantial consequence among the parties, the outcome affects no one other than the litigants.

The rights of the parties as have been determined by the jury are constitutionally protected in accordance with *Atlantic and Gulf Stevedores Inc.* v. *Ellerman Lines,* 369 U.S. 355, 82 S.C. 780, 7 L.Ed. 2d 798 (1962), rehearing denied, 369 U.S. 882, 82 S.C. 1137, 8 L.Ed. 2d 284 (1962).

The jury determined there was sufficient evidence to justify holding the shipowner negligent, and this determination has been affirmed by the Trial Court and the Circuit Court of Appeals.

The argument by the shipowner that the decision of the Court of Appeals misinterprets the decisions of this Court

in *Usner* v. *Luckenbach Overseas Corporation,* 400 U.S. 494, and *Mitchell* v. *Trawler Racer Inc.,* 362 U.S. 539 fails in the face of the specific finding by the Court of Appeals: "II *The Shipowner was at Fault in Many Respects*" 508 F.2d 437, 440.

The second reason for granting the writ propounded by petitioner alleges the Court of Appeals went "outside the record" in making its determination. Those matters referred to by petitioner are specifically based on evidence in the record, or reasonable inferences which a jury may have made in reaching its conclusion. Petitioner misconstrues the function of the appellate court in making this argument.

Respondent, Conceicao, specifically excepts to Petitioner's third argument (p. 8, Brief for Petitioner) regarding an alleged concession made upon oral argument before the Second Circuit Court of Appeals. What was stated in response to a question from the bench was that no argument by counsel was made to the jury in *summation* on the issue of overloading. The evidence was in the case and, therefore, triable by the jury. *Cooper* v. *D/S A/S Progress,* 188 F. Supp. 578 (D.C. Pa., 1960). The Court of Appeals specifically held:

> ". . . That the jury could have found that the accident was caused by the overloading of the pipe crib is perfectly plain to us." (508 F.2d 437, 440)

The fourth argument of the petitioner is directed to its claim for indemnification against the employer, International Terminal Operating Co. Inc. This argument is not directed against respondent, Conceicao, but it is respectfully submitted to the Court that the issue is one which does not merit consideration by this court. The question presented has been rendered moot for further cases

occurring after November 26, 1972 by reason of the amendments to the *Longshoremen and Harbor Workers' Compensation Act,* P.L. 92-576, 86 Stat. 1263, 33 U.S.C. §905(b).

There is no merit to petitioner's contention that the finding of negligence is inconsistent with the finding the vessel was seaworthy, and therefore not legally sustainable. See *Gallick* v. *Baltimore and Ohio R.R.,* 372 U.S. 108 (1963); *Atlantic and Gulf Stevedores, Inc.* v. *Ellerman Lines,* supra; *Malm* v. *United States Lines,* 269 F. Supp. 731 (S.D.N.Y.) *aff'd. on the district court's opinion* 378 F.2d 911 (2 Cir. 1967); and *Henry & Braye* v. *A/S Ocean and John P. Pederson & Sons* (decided Jan. 6, 1975 docket nos. 73-2153, 73-2868, 2d Cir.; —— F2d ——).

• • •

Conditional Cross-Petition

Respondent, Conceicao, respectfully prays that this Court issue Writ of Certiorari on those portions of the judgment in which judgment was entered in favor of petitioner, Netumar, on the cause of action for unseaworthiness, and in which judgment was entered in favor of respondent, New Jersey Export, on the causes of action for negligence and breach of warranty, only in the event this court should grant the Petition for Writ of Certiorari brought by Cia De Nav. Mar. Netumar.

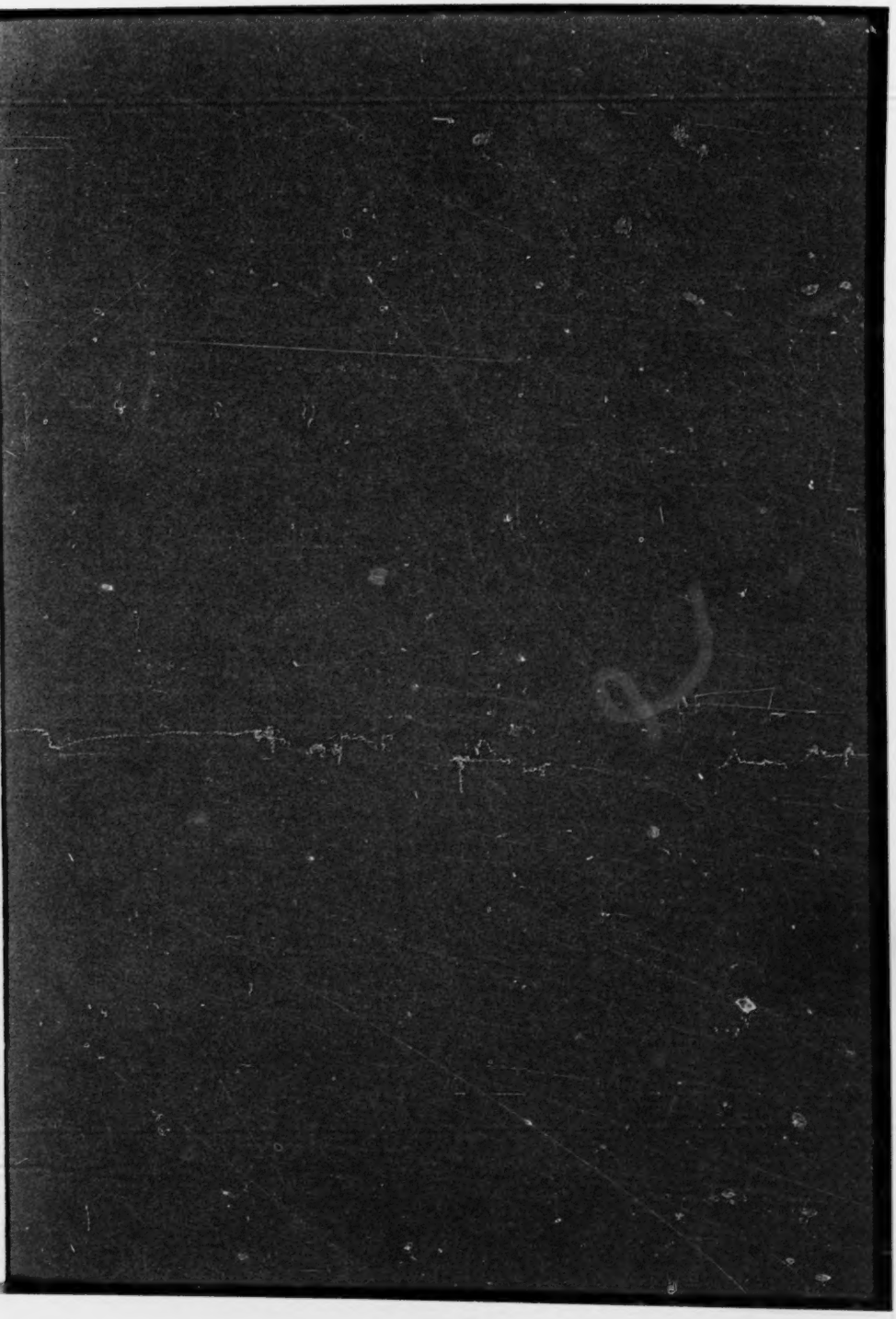
• • •

CONCLUSION

The Petition does not set forth substantial legal issues or conflicts of doctrines or decisions which would merit review by this Court, and respondent, Conceicao, respectfully urges that the Petition be denied.

NATHAN BAKER, ESQ.
Counsel for Respondent
Joaquim Conceicao

GEORGE J. DUFFY
BAKER, GARBER, DUFFY & BAKER
A Professional Corporation
Of Counsel



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1146

CIA DE NAV. MAR. NETUMAR,

Petitioner,

—against—

JOAQUIM CONCEICAO, NEW JERSEY EXPORT MARINE CARPENTERS, INC., and INTERNATIONAL TERMINAL OPERATING CO., INC.,

Respondents.

BRIEF OF INTERNATIONAL TERMINAL OPERATING CO., INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SIDNEY A. SCHWARTZ
Attorney for Respondent,
International Terminal Operating Co., Inc.
801 Second Avenue
New York, New York 10017

ALBERT V. TESTA
of Counsel

INDEX

PAGE

Statement 1

Issue 2

Facts 2

Reasons for Denying Petitioner Certiorari as to Respondent, International Terminal Operating Co., Inc. 6

Conclusion 11

Table of Authorities

Cases:

Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 82 S. Ct. 780 7

Bertino v. Polish Ocean Line, 402 F. 2d 863 (1968) 9

Cooper Stevedoring Co. v. Kopke, Inc., 417 U.S. 106 (1974) 10

H & H Ship Service Company v. Weyerhaeuser Line, 382 F. 2d 711 9

Humble Oil and Refining Company v. Philadelphia Ship Maintenance Co., 444 F.2d 727 8

Hurdich v. Eastmount Shipping Corp., 503 F. 2d 397 (1974) 9

International Term. Op. Co. v. N.V. Nederl. A.S.M., 393 U.S. 74, 89 S. Ct. 53 7

PAGE

Italia Societa Azioni v. Oregon Stevedoring Company, 376 U.S. 315, 84 S. Ct. 748 8

Tennant v. Peoria & P.U. Ry. Co., 321 U.S. 29 7

Weyerhaeuser Steamship Company v. Nacirema Operating Company, 355 U.S. 563, 78 S. Ct. 438 ..... 7, 8

Other Authority:

33 U.S.C.A. §905(b) 10

United States Constitution—
Seventh Amendment 7

In the

Supreme Court of the United States

October Term, 1974

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—against—

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Respondents.

BRIEF OF INTERNATIONAL TERMINAL OPERATING CO., INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement

This is a petition for a writ of certiorari in connection with a judgment of the U. S. Court of Appeals for the Second Circuit entered on December 11, 1974 affirming a judgment in favor of the plaintiff in the sum of $42,000 and a dismissal of the third-party complaint against International Terminal Operating Co., Inc. This case was tried before the Honorable Robert J. Ward and a jury which answered special questions with respect to the issues set forth by the complaint and the third-party complaint. In answering these questions the jury found that the defendant was negligent and its vessel, the SS MOSQUEIRO,

was not unseaworthy and that plaintiff was free of any contributory negligence.

As to the third-party complaint although the jury found that International Terminal Operating Co., Inc. had breached its warranty of workmanlike performance of the stevedoring operation, the jury found that the defendant shipowner was precluded by its conduct from recovering indemnity from International Terminal Operating Co., Inc. Shipowner's motion for judgment notwithstanding the verdict or for a new trial was denied by Judge Ward. The shipowner then filed a notice of appeal and plaintiff filed a notice of protective cross appeal. The appeal was argued on November 14, 1974 and decided and filed on December 11, 1974 at which time the Court of Appeals affirmed the judgment. Shipowner then petitioned for a rehearing with a suggestion for a hearing en banc. This petition was denied on February 3, 1975. The petition for a writ of certiorari was served on March 11, 1975.

Issue

Whether the petitioner has presented any issue of paramount importance for resolution by this Court or any conflict of Circuits dealing with indemnity between shipowner and stevedore which commends itself to this Court granting a writ of certiorari.

Facts

On November 5, 1970 plaintiff was a longshoreman employed by International Terminal Operating Co., Inc., at Pier 36, East River, New York, and was working aboard the SS MOSQUEIRO, a vessel owned by the defendant, Cia de Nav. Mar. Netumar. Plaintiff testified that while

he was engaged with his fellow longshoremen in loading pipes into a pipe bed which had been constructed by the defendant, New Jersey Export Marine Carpenters, Inc., on the weather deck of the SS MOSQUEIRO he sustained an injury to his left foot when it became caught between some of the pipes.

The plaintiff's testimony in this case indicated that one or more of the uprights supporting the pipe bed, made by the defendant, New Jersey Export Marine Carpenters, Inc., broke or collapsed causing the pipe to roll onto plaintiff's left foot resulting in the injuries for which this action was brought (30a, 31a, 68a). Plaintiff himself testified that the uprights broke notwithstanding the fact that the pipes were landed nice and easy by the longshoremen and the winch man had put them in place perfectly (45a, 49a, 70a, 71a). Plaintiff testified that although he was present throughout the entire loading operation he did not see any draft of pipes strike any of the uprights in the pipe bed (48a, 51a, 60a, 71a, 74a).

James Ratliff, I.T.O.'s hatch boss, testified that the longshoremen loaded the pipes in the locations where they were told to load them by the ship's officers and although he was present throughout the loading operation he did not see any of the drafts of pipes strike the uprights (80a, 106a). Nevertheless it was his testimony that one of the uprights in the pipe bed broke (93a, 104a, 105a). It was also his testimony that he inspected the pipe bed and saw nothing wrong with it and that after the plaintiff's accident happened pipes were loaded on top of the No. 1 hatch (85a, 86a, 99a).

James Head, another witness called by the plaintiff, testified that after the accident the longshoremen began loading pipes across the hatch covers up to a level with

the pipes in the pipe beds on either side of the No. 1 hatch (133a, 134a, 137a, 138a). He also testified that the pipes were lowered into the pipe bed very gently and did not strike the uprights at any time (132a). William Brooks, another witness called by the plaintiff, testified that the uprights in the pipe bed collapsed while the plaintiff was reaching for the hook to unhook the last draft and that the pipes only moved when the pipe beds collapsed (140a, 141a). Brooks also testified that when the longshoremen returned to work in the afternoon they began to load pipes across the top of the No. 1 hatch (161a).

The plaintiff, Ratliff, Brooks and Head, agreed that throughout the course of the loading operation the pipes were lowered and landed gently into the pipe bed and that at no time did any of the pipe come into contact with any of the uprights of the pipe bed. Furthermore, they all testified that at no time did they observe any damage to any part of the pipe bed (36a, 71a, 80a, 106a). Ratliff, Head and Brooks were also in complete agreement that one or more uprights broke at the time of plaintiff's accident (77a, 78a, 104a, 105a, 121a, 140a, 141a).

The testimony on behalf of the plaintiff thus presented a factual situation wherein the plaintiff and his witnesses all testified that, despite the fact that no draft of pipes struck the uprights in the pipe bed at any time prior to plaintiff's accident, the uprights in the pipe bed broke or collapsed at the time of plaintiff's accident causing one or more pipes to roll upon his left foot. Although the plaintiff and his witnesses testified that, at the time of the accident, the pipes were loaded below the top of the uprights in the pipe bed, William Montella, General Manager of the defendant, New Jersey Export Marine Carpenters, Inc., testified that when he saw the pipe bed after the

plaintiff's accident the pipes were loaded higher than the uprights (258a).

Montella also testified that Richard Piper, the Port Captain for the defendant shipowner, told him exactly what to do in connection with the construction of the pipe beds right down to what nails to use and what lumber to use (236a). Montella further testified that Piper ordered two pipe beds and not 3 (169a, 202a, 253a). Piper admitted that as Port Captain he was responsible for the loading and unloading of the vessel in conjunction with the ship's officers (173a). Piper also testified that there were some 41 pieces of pipe to be loaded in the pipe beds on either side of the No. 1 hatch and it appeared from the cargo plan that there were 41 pieces of pipe to be loaded in the vicinity of the No. 1 hatch (180a).

Although Richard Piper did not appear personally at the trial, his pre-trial deposition was read into evidence and it was his testimony that he had the responsibility for the loading and unloading of the vessel (175a) and also to coordinate stowage, the ordering of labor and equipment and the overall supervision of the loading operation (172a).

Piper testified that he verbally ordered 3 pipe beds from the defendant, New Jersey Export Marine Carpenters, Inc., (184a) and although he admitted that he did not specifically tell Montella the amount of pipe to be loaded into these pipe beds, he claimed that he gave him the full booking of the vessel and left it up to him to determine the size and location of each pipe bed (184a, 185a, 186a).

Captain James White, the expert who testified for New Jersey Export Marine Carpenters, Inc., stated that the carpenters made the pipe bed for the shipowner and that

in the normal and customary practice the shipowner would accept or reject the pipe beds, based upon its own inspection thereof (267a). Captain White also testified that it was customary for ship's officers to shake the uprights to see if they were wobbly in the course of its inspection (268a, 269a).

Captain William Wheeler, I.T.O.'s expert, testified that the chief mate and the carpenter foreman had the duty to inspect the pipe bed (337a). Captain Wheeler further testified that since the pipe bed was made for the shipowner the chief mate had the duty of inspecting it and, if he was satisfied, he would then turn it over to the stevedore for the pipe loading operation (370a, 371a, 376a, 384a, 385a). Captain Wheeler also testified that the hatch boss was only required to make a visual inspection of the pipe bed and that the shipowner had an officer in overall supervision of loading (336a, 337a, 338a, 370a, 384a, 385a).

The various motions, made at various junctures of the case, were denied by the Court (190a-200a, 323a-332a, 393a, 394a). The Court, in denying the defendant's post-trial motion, held that there was sufficient probative evidence to support the jury's verdict and that there was evidence of conduct on the part of the shipowner sufficient to preclude recovery of indemnity (459a, 460a).

Reasons for Denying Petitioner Certiorari as to Respondent, International Terminal Operating Co., Inc.

The Trial Court in an unassailable charge in a maritime personal injury case and the United States Court of Appeals in its decision affirming in all respects the judgment below have correctly applied the maritime law as to all facets of this case.

The proof in this case established conduct on the part of the shipowner precluding indemnity and the jury so found. The jury verdict in favor of respondent, International Terminal Operating Co., Inc., on that subject is unassailable on appeal since it is supported by the evidence and was solely within the jury's province to decide. *Weyerhaeuser Steamship Company* v. *Nacirema Operating Company,* 355 U.S. 563, 78 S. Ct. 438; *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.,* 369 U.S. 355, 82 S. Ct. 780; *International Term. Op. Co.* v. *N.V. Nederl. A.S.M.,* 393 U.S. 74, 89 S. Ct. 53.

In the *Weyerhaeuser* case, *supra,* this Court held that whether a contractor had breached its warranty of workmanlike performance and whether a shipowner's conduct is sufficient to preclude recovery of indemnity are issues for jury consideration under appropriate instruction. This proposition is so fundamental that it is no longer open to argument. Since this Court held that the indemnity issues are for jury consideration, it follows that these issues were properly submitted to the jury for their consideration in this case and so the Court below found.

In the *Ellerman* case, *supra,* this Court said that neither the Supreme Court nor the Court of Appeals could redetermine facts found by the jury any more than the District Court can predetermine them since it would result in a collision with the Seventh Amendment. Claims for maritime indemnity must be left to the jury's determination and once the jury has made a determination with respect thereto no appellate Court may set aside the verdict because it feels that other results are more reasonable. *International Terminal Operating Co., Inc.* v. *N.V. Nederl.,* 393 U.S. 74, 89 S. Ct. 53, *Tennant* v. *Peoria & P.U. Ry. Co.,* 321 U.S. 29.

The function of a reviewing Court then is solely to determine if there is any evidence to support the verdict. In this case there is ample testimony to support conduct on the part of the shipowner sufficient to preclude recovery of indemnity from the stevedore and so the Court below held. Conduct sufficient to preclude indemnity can be an act of omission or commission and the shipowner can be precluded by action or inaction on its part.

The *Weyerhaeuser* proposition, as enunciated by this Court, indicating that a shipowner is entitled to indemnity absent conduct on its part sufficient to preclude recovery is not restricted to active conduct on the part of the shipowner which would prevent, hinder or handicap a stevedore in performing a workmanlike job. *Humble Oil and Refining Company* v. *Philadelphia Ship Maintenance Co.*, 444 F. 2d 727. Certainly a direction by a shipowner to a stevedore to load more pipes into a pipe bed than it would hold would actively hinder the stevedore in the performance of its work and prevent it from doing a workmanlike job.

Manifestly, the shipowner was negligent in failing to order enough pipe beds, in attempting to load too much pipe into beds which it had ordered and in negligently supervising or failing to supervise the loading operation so as to prevent the pipe beds, which it had ordered, from being overloaded. This conduct on the part of the shipowner not only constitutes negligence but constituted conduct on its part which handicapped the stevedore in the performance of its work and precluded the shipowner from recovering indemnity.

In *Italia Societa Azioni* v. *Oregon Stevedoring Company*, 376 U.S. 315, 84 S. Ct. 748, this Court held that liability for a longshoreman's injury should fall upon the party best situated to adopt preventive measures and thereby

reduce the likelihood of injury. This philosophy of permitting the ultimate loss to fall upon the party which was best able to prevent that loss has been followed in the Second Circuit. *Hurdich* v. *Eastmount Shipping Corp.*, 503 F. 2d 397 (1974); *Bertino* v. *Polish Ocean Line*, 402 F. 2d 863 (1968). The party to this case most able to minimize the particular risk involved was obviously the shipowner and the Court below was correct in upholding the jury verdict and the Trial Court in denying indemnity to the shipowner.

The decision of the Court below is not in conflict with the decision of other Courts of Appeals on the question of conduct precluding indemnity. The Third Circuit in the *Humble Oil* case, *supra*, held that *inaction* by the shipowner could constitute conduct precluding indemnity and the Court of Appeals in the Ninth Circuit in *H & H Ship Service Company* v. *Weyerhaeuser Line*, 382 F. 2d 711, cited by petitioner, did *not* hold that inaction can *never* be sufficient to preclude indemnity.

That part of the petition dealing with the alleged inconsistency in the jury's verdict with respect to the plaintiff's recovery is left for Respondent, Conceicaio, to deal with. It plays no part in the resolution of the question of indemnity.

With the Trial Court having properly submitted to the jury, under a proper charge, the question of shipowner's conduct precluding indemnity, with the jury having decided that question in favor of International Terminal Operating Co., Inc., and with the Court of Appeals having determined that sufficient evidence supports that result,* nothing is presented by petitioner vis-a-vis Inter-

* (Appendix A18, following the petition):
"We think it clear that the party to this case most able to minimize the particular risk involved was the shipowner *since*,

national Terminal Operating Co., Inc. which commends itself to this Court. Indeed, in complaining of what the United States Court of Appeals wrote with regard to the plaintiff's recovery and the "fact findings" which it allegedly made, petitioner avers that it was denied

> "the right guaranteed by the Seventh Amendment to have all issues determined by a jury." (P. 8 of petition)

Surely, it cannot be heard to complain with regard to International Terminal Operating Co., Inc. where its dispute with International Terminal Operating Co., Inc. had been submitted to a jury, as dictated by the decisions of this Court and subordinate Courts.

With respect to indemnity, petitioner does not present a question of paramount importance for this Court to settle. Not only has the criteria fo indemnity been enunciated by this Court heretofore, time and again, but with regard to accidents after November 26, 1972, the Congress has outlawed all kinds of indemnity actions against the stevedore-employer, 33 U.S.C.A. §905(b); *Cooper Stevedoring Co.* v. *Kopke, Inc.*, 417 U.S. 106 (1974).

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on sufficient evidence, the jury found that there was 'action or inaction on the part of the shipowner which prevented, hindered or seriously handicapped the stevedore in performing a workmanlike job'".

CONCLUSION

It is familiar learning that not every petition, submitted by a petitioner, who is disgruntled over the result of litigation, commends itself to this Court's consideration. Certainly nothing has been presented in the instant matter with which this Court should tarry in reaching a decision denying the petition for a writ.

Respectfully submitted,

SIDNEY A. SCHWARTZ
Attorney for Respondent,
International Terminal Operating Co., Inc.
801 Second Avenue
New York, New York 10017

ALBERT V. TESTA
of Counsel

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Respondents.

SUPPLEMENTAL AND REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

VICTOR S. CICHANOWICZ
Counsel for Petitioner
80 Broad Street
New York, New York 10004

JOHN P. SCHAFFER,
Of Counsel

TABLE OF CONTENTS

	PAGE
Statement	1
Conclusion	6

Cases Cited

Atlantic and Gulf Stevedores Inc. v. *Ellerman Lines*, 369 U.S. 355 (1962), rehearing denied 369 U.S. 882 (1962)	4
Bernardini v. *Rederi A/B Saturnus and International Terminal Operating Co., Inc.*, No. 74-1404 (2 Cir., Mar. 11, 1975)	2
Mahnich v. *Southern S.S. Co.*, 321 U.S. 96 (1944)	6
New York Central Railroad Company v. *Edward H. Johnson*, 279 U.S. 310 (1929)	4
Pope & Talbot Inc. v. *Hawn*, 346 U.S. 406 (1953)	5
Usner v. *Luckenbach Overseas Corporation*, 400 U.S. 494 (1971)	2
Waldron v. *Moore McCormack Lines*, 386 U.S. 724 (1967)	6

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SUPPLEMENTAL AND REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement

This supplemental and reply brief in support of the petition for a writ of certiorari is being filed to call the attention of this Court to a new case not available at the time of filing of the original petition, and is addressed to arguments first raised in the briefs in opposition.

I

The Court of Appeals for the Second Circuit has rendered a decision from which it is apparent that its decision in this case not only misinterprets the decisions of this

Court, but also is in direct conflict with the law on the warranty of seaworthiness as it has been defined and expanded over the last 25 years.

In *Bernardini* v. *Rederi A/B Saturnus* (decided March 11, 1975, 2 Cir. docket no. 74-1404) the Court said:

> "In *Conceicao,* the single act was the overloading of a storage bin that itself was sufficiently sturdy to bear a normal load . . . It is true that in *Conceicao* we went somewhat further than the Supreme Court did in *Usner,* for in *Usner* the single act of negligence was performed by a longshoreman and not by a member of the crew, while in *Conceicao,* the operative negligence was the fault of one of the ship's officers."

This Court was explicit in *Usner* v. *Luckenbach Overseas Corp.,* 400 U.S. 494 (1971) that its decision was restricted to a third party's single and wholly unforeseeable act of negligence and that no ship's crew member was in any way involved in the case (400 U.S. at page 500).

II

At page 3 of its brief Respondent International Terminal Operating Co., Inc. (International) states that "the longshoremen loaded the pipes in the locations where they were told to load them by the ship's officers."

At page 8 of its brief International further states:

> "Certainly a direction by a shipowner to a stevedore to load more pipes into a pipe bed than it would hold would actively hinder the stevedore in the performance of its work and prevent it from doing a workmanlike job."

Both New Jersey Export and International at pages 5 and 6 of their respective Briefs, state that Captain William Wheeler testified that the ship had an officer in overall supervision of the loading. However, neither are candid

with this Court that Captain Wheeler was not an eyewitness but was testifying merely as an expert.

At page A-12 Appendix to Petition (440 of 508 F.2d) the Court of Appeals however said:

> "There was no evidence from Piper or any other witness that he had given any information about the pipes, correct or incorrect, to the stevedore."

And at page A-12 (441) it further stated:

> "The loading of pipes in the starboard pipe bed was up to the top of the uprights or higher. And the necessary information for the proper conduct of the loading and stowage operation had not been given to those to whom the information was indispensable if they were to do a proper job. When these pieces of proof are put together, we think there was ample proof to justify a finding that the shipowner had failed to give this particular part of the loading and stowage operation the necessary supervision, * * *."

Someone obviously is not following the record. International overlooks the fact that it was its counsel who successfully prevented the carpentry foreman from giving testimony as to whether the pipe bed as constructed could hold pipe loaded above the uprights on the grounds that there was no such testimony in the case. With this, the trial judge agreed, and on the basis thereof sustained the objection.

At page 6 of its Brief International asserts that the charge of the trial court was "unassailable". Respondent Conceicao, on the other hand, does not dispute that the trial court did not charge the jury on overloading. While at page 4 of his Brief Respondent Conceicao takes exception to the concession which Petitioner asserts was made by his counsel on the argument of the appeal, he admits

that overloading was not argued in his summation to the jury and then dismisses the matter by asserting that the evidence was in the case. None of the respondents however can point to a word in the trial court's charge which could be construed as touching on the issue of overloading.

Atlantic and Gulf Stevedores Inc. v. *Ellerman Lines,* 369 U.S. 355 (1962) rehearing denied 369 U.S. 882 (1962), does not extend the protection of the Seventh Amendment to issues which are not submitted to a jury under a proper charge.

As a matter of fact, overloading never surfaced as an issue in the case until the case reached the Court of Appeals. (A1-A4 Appendix to Petition). On the trial Respondent Conceicao consistently maintained that his claims for recovery both under negligence and breach of warranty of seaworthiness were predicated on the fact that the pipe bed broke in normal use.

A trial is not a private controversy of no importance to the public. Fair trials are an interest of the state and it is the duty of court and counsel to see to it that every litigation is fairly and impartially conducted and that verdicts of juries are rendered only on the issues made by the pleadings and evidence. *New York Central Railroad Company* v. *Edward H. Johnson,* 279 U.S. 310, 318 (1929).

All of the respondents and the Court of Appeals, however, devote considerable attention to the testimony of Petitioner's Port Captain Piper, New Jersey Export's General Manager and Foreman William Montella, and the two experts White and Wheeler with respect to the construction of the pipe bed in question, the number of pipe beds which were ordered and the number actually built, the duties of the shipowner to inspect the pipe bed on the completion of construction and the quantity of pipe and where it was stowed, and urge that there is support in that testimony for a finding of negligence. They all overlook the

fact that in its charge the trial court instructed the jury that they could find the vessel unseaworthy if the pipe bed was not reasonably fit for its intended purpose, if the place of work was unsafe, or if the method used for the stowage of cargo was not suited for safe operations, and the jury found that the vessel was not unseaworthy. Since the shipowner therefore had not breached its absolute duty in any of these respects, what it did or did not do, or what should have been done, is of no consequence. Conduct which does not result in a condition which renders the vessel unseaworthy, hardly supports a finding of negligence.

This is not one of those cases to which the late Mr. Justice Frankfurter had reference in his concurring opinion in *Pope & Talbot Inc.* v. *Hawn,* 346 U.S. 406, 418 (1953) when he said:

> "Since unseaworthiness affords longshoremen recovery without fault and has been broadly construed by the courts, e.g., *Mahnich* v. *Southern S.S. Co.,* 321 U.S. 96, 88 L. ed. 561, 64 S.Ct. 455, note 2, supra, it will be rare that the circumstances of an injury will constitute negligence but not unseaworthiness."

It is therefore absurd to say that the shipowner was negligent in not supervising a method of stowing cargo which was safe, permitting too much pipe to be loaded into a pipe bed which was reasonably fit for its intended purpose and in a place of work which was safe, and in not providing the necessary information for the construction of a pipe bed which as constructed was reasonably fit for its intended purpose.

III

The fact that the decision in this case was rendered in a longshoreman's case does not mean that it affects only longshoremen's rights under the warranty of seaworthiness. The same principles have been applied in seamen's cases and will continue to be so applied. The decision below severely restricts the very rights which were accorded sea-

men under the warranty of seaworthiness in cases such as *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96 (1944) and *Waldron* v. *Moore McCormack Lines*, 386 U.S. 724 (1967). If the decision below is followed, seamen no longer will be protected by the warranty of seaworthiness for misuse of seaworthy equipment unless they establish negligence.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

VICTOR S. CICHANOWICZ
Counsel for Petitioner
80 Broad Street
New York, New York 10004

JOHN P. SCHAFFER,
Of Counsel